Office-Supreme Court, U.S.
FILED
JUN 11 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 149

PEERLESS WEIGHING AND VENDING MACHINE CORPORATION, A CORPORATION,

Appellant,

vs.

PUBLIC BUILDING COMMISSION OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

ON APPEAL FROM THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION OF APPELLEE, PUBLIC BUILDING COMMISSION OF CHICAGO, TO DISMISS.

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a Municipal Corporation.

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THE BLAKELY-HARRIS PRINTING COMPANY, CHICAGO

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Appellee, Public Building Commission of Chicago, submits this Motion to Dismiss the direct Appeal sought to be taken by the Appellant, Peerless Weighing and Vending Machine Corporation, from the decision of a Three Judge Federal District Court on the ground that the Appeal is not within the jurisdiction of the Supreme Court of the United States because the Notice of Appeal was not filed in the District Court within 60 days as required by Title 28, United States Code, Section 2101(b).

STATEMENT.

As noted in Appellant's Jurisdictional Statement[1] this is an Appeal sought to be taken directly to this Court by the Appellant from the decision of the Three Judge District Court for The Northern District of Illinois, Eastern Division, denying, after hearing, Appellant's request for a permanent injunction to restrain the Appellee, its agents, employees and representatives from proceeding with an eminent domain proceeding theretofore filed by the Appellee in the Circuit Court of Cook County, Illinois, against the Appellant and others under and by virtue of the provisions of the Public Building Commission Act of Illinois.[2] The Appellant, in seeking its injunction to restrain proceedings in the State Court, urged that Section 14.1 of that Act was unconstitutional and void under Section 1 of the Fourteenth Amendment to the Constitution of the United States. As also noted in Appellant's Jurisdictional Statement[3] the Three Judge District Court was convened pursuant to the provisions of Title 28 United States Code, Sections 2281 and 2284.

The Judgment of the Three Judge District Court denying Appellant's request for a permanent injunction and dismissing Appellant's cause of action was entered on February 14, 1962[4] and the Appellant thereafter filed its Notice

1. Appellant's Jurisdictional Statement, pp. 2-3.

2. 1961 Illinois Revised Statutes, Chapter 34, Sections 3301 to 3325. See Appellant's Jurisdictional Statement, Appendix B, pp. 33 to 63.

3. Appellant's Jurisdictional Statement, p. 2.

4. R 3; 361; See, also: Appellant's Jurisdictional Statement, p. 2.

of Appeal in the District Court on to-wit, Tuesday, April 17, 1962,[5] a time interval of 62 days between the entry of the final judgment and the filing of the Notice of Appeal.

ARGUMENT.

This Appeal Must Be Dismissed Because the Notice of Appeal Was Not Filed Within 60 Days as Required by Title 28, United States Code, Section 2101(b).

Rule 11(3) of this Court provides that "An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the Clerk of the appropriate court within the time allowed by law for taking such appeal." Paragraph 1(a) of Rule 16 of this Court provides: "The Court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute or to these rules."

The jurisdiction of the Supreme Court of the United States to review the decision of a three judge district court is conferred by Title 28, United States Code, Section 1253. To secure this right of direct appeal, however, a Notice of Appeal must be filed within the prescribed time limitations in conformity to statute as provided in Rule 11(3) of this Court, *supra*.

The time within which *direct* appeals shall be taken to the Supreme Court of the United States are set forth in Title 28, United States Code, Section 2101(a) and 2101(b), the latter subsection of which provides as follows:

"§ 2101(b) Any other *direct* appeal to the Supreme

5. R 3; 373; See, also: Appellant's Jurisdictional Statement, p. 2.

Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

This Court has consistently held that the time within which direct appeals shall be taken to the United States Supreme Court under Title 28, United States Code, Section 1253 are governed by Title 28, United States Code, Section 2101(b) *supra*. *Frozen Food Express* v. *United States*, 351 U. S. 40, 43; *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 51; *Dixie Carriers* v. *United States*, 351 U. S. 56, 58; *Denver & R. G. W. Co.* v. *Union P. R. Co.*, 351 U. S. 321, 327; *King* v. *United States*, 344 U. S. 254, 260; *Henderson* v. *United States*, 339 U. S. 816, 822, 823.

It has likewise been consistently held that the filing of a timely notice of appeal is a jurisdictional prerequisite and that if the Notice of Appeal is not filed within time the reviewing court is without jurisdiction. *Wagoner* v. *Fairview Consolidated School District No. 5* (United States Court of Appeals, Tenth Circuit, 1961), 289 Fed. 2d 480, 481; *Schlink* v. *Chesapeake & Ohio Railway Co.* (United States Court of Appeals, Sixth Circuit, 1960), 276 Fed. 2d 116, 117; *Gunther* v. *E. I. DuPont De Nemours & Company* (United States Court of Appeals, Fourth Circuit, 1958), 255 Fed. 2d 710, 715.

Conclusion.

The Appellant, Peerless Weighing and Vending Machine Corporation, not having filed its Notice of Appeal within sixty days as required by Title 28, United States Code, Section 2101(b), this Court is without jurisdiction and the Appeal must therefore be dismissed.

Respectfully submitted,

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OF CHICAGO,
a Municipal Corporation.

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